

A Study of *Dukes v. Wal-Mart* and Its Implications on Sex Discrimination

An Honors Thesis by:

Jessica Blaize

Advisor

Dr. Jennifer Bott

A handwritten signature in black ink, appearing to read "Jennifer Bott", with a stylized, cursive script.

Ball State University
Muncie, Indiana

May 2006

Abstract

During the past five years, the largest employer in the world has been repeatedly accused of sex discrimination against its female employees. Wal-Mart Stores operate discount stores, supercenters, membership-only stores, and neighborhood markets, selling goods and services at boasted "always low prices." Plaintiffs in the case, *Dukes v. Wal-Mart*, claim that discriminatory policies and practices are consistent throughout Wal-Mart stores across the nation. All women who work or have worked in Wal-Mart stores have been subjected to discriminatory pay and promotions policies, said plaintiffs, who seek class-wide injunctive and declaratory relief, lost pay, and punitive damages. All women in the United States should have the opportunity for equal employment under Title VII of the Civil Rights Act of 1964 and equal pay under the Equal Pay Act of 1963. The analysis of this case and its implications for women in the workforce should be fully understood by employers and the female population.

I would like to thank Dr. Jennifer Bott for her inspirational role in my academic career. Through her leadership and dedication, she has helped me find my niche in human resources. Thanks for everything!

Table of Contents

<u>Section</u>	<u>Description</u>	<u>Page</u>
Section I:	Sam Walton and Wal-Mart	4
	Introduction to Case	4
	Sam Walton and the History of an Empire	4
Section II:	Equal Employment Opportunity Law	8
	Civil Rights Act of 1964	9
	Equal Pay Act of 1963	12
	Civil Rights Act of 1991	14
Section III:	Study and Analysis of <i>Dukes v. Wal-Mart</i>	16
	Wal-Mart's Compensation Policies	16
	Wal-Mart's Promotion Policies	19
	Wal-Mart's Corporate Culture	21
	Evidence of Discrimination	25
	Regarding Compensation	26
	Regarding Promotions	27
	Anecdotal Evidence of Discrimination	28
	Conclusion	29
Section IV:	Outcomes and Implications	30
	Current Status of <i>Dukes v. Wal-Mart</i>	30
	Predicted Outcome	30
	Implications for Employers	31
	Implications for Women	32
Appendix I:	Wal-Mart's Organizational Chart	34

Section I: Sam Walton and Wal-Mart

Introduction to Case

Plaintiffs in *Dukes v. Wal-Mart* presented statistical evidence which shows that women working at Wal-Mart stores are paid less than men in every region. Such pay disparities exist in most job categories and the salary gap widens over time, even for men and women hired into the same jobs simultaneously. Women take longer to enter into management positions, and the further up Wal-Mart's corporate ladder is reviewed, the lower the percentage of women. It is on this basis of gender discrimination that six female current and former Wal-Mart employees came to represent more than 1.6 million women in the landmark class action lawsuit of *Dukes v. Wal-Mart*.

The purpose of this work is to give one an understanding and knowledge of this particular case. By reviewing information regarding Sam Walton's vision for Wal-Mart and United States labor laws, it becomes easier to comprehend the details of this case, which has the potential to immensely affect other retail chains and the women who are employed in those stores. The goal is not to cast blame, as currently the case is on hold, but simply to gather the facts and let one draw his or her conclusions. The major section of this work that examines the case in detail provides information on how the lawsuit became a class action case. However, this being said, the author chose to state her thoughts on the outcomes of the lawsuit near the end of this work.

Sam Walton and the History of an Empire

A rural young man from Bentonville, Arkansas, Sam Walton was a man whose good health, tennis-trim figure, and athletic stride were envied by others. Described as having the motto of "work, work, and more work," Walton could crack a smile, but he

was usually sober-faced (Trimble 111). His story is about “entrepreneurship, risk, hard work, knowing where you want to go and being willing to do what it takes to get there,” as stated by Walton in his autobiography Sam Walton: Made in America (xiii). In this work, Walton attempted to explain why Wal-Mart has flourished over the years when so many other discount stores failed. He claimed that “failure boils down to not taking care of customers, not minding the stores, not having folks in the stores with good attitudes, and that was because they never really even tried to take care of their own people” (103). From Wal-Mart’s humble beginnings in 1962, Sam Walton operated the company with three principles: have respect for the individual, give service to the customers, and strive for excellence. These principles have remained Wal-Mart’s claim to fame and are mentioned on its website as the company’s philosophy for success. Of Walton’s ability as an entrepreneur, friend Abe Marks commented:

Anyway, the man’s a genius. He became, really, the best utilizer of information to control absentee ownerships that there’s ever been. Which gave him the ability to open as many stores as he opens, and run them as well as he runs them, and to be as profitable as he makes them (Walton 110-111).

As for Walton’s role in the company, in addition to personally selecting location sites for a new store, he was responsible for “picking good people and giving them the maximum authority and responsibility” (Walton 147). He declared that his style was virtually determined by his talents. Walton was a man who knew his strengths and relied on others to make up for his weaknesses.

Of those weaknesses included showing gratitude and fairness to the employees who worked at Wal-Mart stores throughout the country. Although Walton attributed Wal-Mart’s overall success and performance over competitors to the relationship the

company had with its employees, he was aware that they were not treated very well. He even admitted, "I would love to tell you that from the very beginning we always paid our employees better than anyone else paid theirs, and treated them as equals. Unfortunately, that wouldn't be true," (Walton 162). Very early in its life as a major discount retailer, Wal-Mart set its reputation for having a good relationship with its managers and paying them well. On the other hand, the company did not do much for the clerks besides pay them an hourly wage. Walton assumed, "I guess that wage was as little as we could get by with at the time. In fairness to myself though, that was pretty much the way retail was in those days, especially in the independent variety store part of the business," (Walton 162). Later on in his autobiography, Walton stated:

We didn't pay much. I wanted everybody to do well for themselves. I was so doggoned competitive, and so determined to do well, that I was blinded to the most basic truth, really the principle that later became the foundation of Wal-Mart's success. Payroll is one of the most important parts of overhead, and overhead is one of the most crucial things you have to fight to maintain your profit margin. Back then, though, I was so obsessed with turning in a profit margin of 6 percent or higher that I ignored some of the basic needs of our people, and I feel bad about it (163).

Even his wife, Helen Walton, recognized the inequalities among the employees of Wal-Mart. She recounted a conversation she once had with her husband during a trip.

We were talking about the high salary that Sam was earning, and about all the money and benefits that he was paying the officers of the company in order to keep his top people. He explained that the people in the stores didn't get any of those benefits, and I think it was the first time I realized how little the company was doing for them. I suggested to him that unless those people were on board, the top people might not last long either. I remember it because he didn't really appreciate my point of view at the time. Later on, I could tell he was really thinking about it, and when he bought it, he really bought it (Walton 165).

Despite these confessions, Walton strongly fought efforts of organized labor to lure his employees out of what he considers his “family” environment. To avoid unionization, Wal-Mart prepared itself by producing internal propaganda. A manual entitled “A Manager’s Toolbox to Remaining Union Free” was distributed, along with videos and workshops for store managers, emphasizing their role as the “first line of defense” against union campaigns (Dicker 94). On several occasions when union representatives tried to sign up employees, “Walton jumped up and made strong personal arguments that the associates already had better wages, benefits, and bonus incentives than any union could possibly gain for them,” (Trimble 228). In his book, The United States of Wal-Mart, John Dicker even asserted that Walton “showed no qualms about threatening store and warehouse closures to beat back union campaigns,” (93).

But the change was slow and happened in very small increments. Due to Wal-Mart’s strong corporate culture and unique personality, the company developed a major problem – a resistance to change. Walton said that he was forced to change, sometimes just to say things were changing, during Wal-Mart’s growth. For instance, Walton confessed that Wal-Mart was just as discriminatory towards women as other retailers in the industry. Women were thought not to be able to handle anything more than the position of clerk or maybe assistant manager. As Bob Ortega mentioned in his book on Walton, he did not think women were “cut out for managerial positions” (211). The more important positions in management were devoted solely to men. Despite the multi-year attempts of several board members to get Walton to appoint a woman to the board of directors, the idea did not receive approval for a long time. Like most corporate boards in the second half of the twentieth century, Wal-Mart’s directors were

mainly middle-aged, successful white businessmen, who shared the same viewpoints on women as Walton. Years later, Hillary Clinton did gain a spot on Wal-Mart's executive board, only to resign in 1992 during her husband's presidential campaign (Ortega 214).

But, he claimed that the industry has acknowledged the fact that women could be great retailers. Wal-Mart's next step was to do everything it possibly could do to recruit and attract women (Walton 218). Notably, his autobiography does not specifically state what the company began doing to open its doors to females. Ortega's work corroborates this statement, declaring that "Wal-Mart has steadily declined to make public any figures showing how many women it had running stores or in mid-level management" (214). It is apparent that at least a gender bias, and perhaps discrimination, has been part of Wal-Mart's values and beliefs since its inception.

Section II: Equal Employment Opportunity Law

Federal Equal Employment Opportunity (EEO) laws are a branch of labor laws that prohibit workplace discrimination. Six employment laws are categorized under the EEO: Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Title I and Title V of the Americans with Disabilities Act of 1990, Sections 501 and 505 of the Rehabilitation Act of 1973, and the Civil Rights Act of 1991. These laws, which focus on workplace discrimination based on race, color, religion, sex, national origin, age, and disability, are enforced by the Equal Employment Opportunity Commission, or EEOC.

The EEOC is responsible for the oversight and coordination of all federal equal employment regulations, practices, and policies (U.S. EEOC). Each year, more than

80,000 complaints from employees are received by the Commission. Throughout the 1990s, the monetary benefits won for such employees grew substantially. Large monetary settlements often arise when the EEOC files a class action suit against an employer. In the Civil Rights Act of 1991, punitive and compensatory damages were added as class action remedies. Jackson and Schuler define a class action suit as “a group of similar employees (e.g., a class) asserting that all members of an employee class suffered due to an employer’s unfair policies” (95). In other words, this type of lawsuit is brought by individuals on behalf of a large group of people with the same principal claims. Next, a judge decides if the case meets the legal requirements for a class action. Assuming the requirements are met, all class members are consequently covered by the suit, unless asked to be excluded. Finally, the case either goes to trial or the claims are resolved before trial in a settlement for the entire class (Wal-Mart Class).

Three of the EEO laws are paramount in the class action lawsuit *Dukes v. Wal-Mart*. Plaintiffs in the case argue that Wal-Mart has purposefully and repeatedly implemented discriminatory policies and practices against at least 1.6 million women, including discriminatory promotions and pay procedures. Through an in-depth explanation of Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the Civil Rights Act of 1991, it becomes clear to grasp that Wal-Mart is in violation of these labor laws.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 (CRA '64) is the most comprehensive EEO law, protecting five classes: race, color, religion, sex, and national origin. This law

covers all U.S. employers with fifteen or more employees who work for twenty or more calendar weeks of the year. One must understand that Title VII has been amended several times since 1964; the most critical of these amendments are contained in the EEO Act of 1972, President Carter's Reorganization Plan of 1978, and the Civil Rights Act of 1991, as stated by Gutman (5).

Title VII prohibits employment discrimination, which is a term for a trilogy of prohibitions that are related to (a) terms, conditions, and privileges of employment; (b) segregation and classification; and (c) retaliation. Terms, conditions, and privileges refer to personnel practices such as hiring and firing; compensation, assignment, or classification of employees; job advertisements and recruitment; training and apprenticeship programs; transfer, promotion, discharge, or recall; and benefits. Segregation means physical division of employees, and classification means different job titles for the same or similar jobs. The retaliation provision protects employees for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices (Gutman 6). Under CRA '64, employees could only seek damages related to back pay, interest, and other lost job benefits.

Sex Discrimination

Sexual discrimination is divided into two types of sexual harassment: quid pro quo and hostile environment. First, in quid pro quo harassment – “something for something” – submission to sexual advances or favors is made a condition of receiving or keeping a job or job benefit. An employer or supervisor would use his or her power over offering or withholding a job benefit to extract sexual favors from an employee. On the other hand, hostile environment harassment proves evidence of severe and

pervasive conduct, such as repeated sexual or gender-stereotyped abuse that interferes with job performance or adversely affects the individual's employment opportunities. Usually hostile environment harassment is thought to be sexually-based, but is frequently gender-based. This type of harassment must be repetitive or systematic, but excludes tangible employment consequences (Gutman 110). From this point forward, Wal-Mart's alleged violations of hostile environment harassment will be referred to as 'gender discrimination.'

The criterion for evaluating harassment is whether a "reasonable person" in the same or similar circumstances would ascertain the conduct as "intimidating, hostile, or abusive" (Jackson and Schuler 106). The perspective of the victim – reflecting her or his race, color, religion, gender, and national origin has an important place in the evaluation. Thus, the EEOC guidelines clearly state that employers are liable for the acts of those who work for them if they knew or should have known about the conduct and took no immediate, appropriate corrective action (Jackson and Schuler 106). This is called "strict liability."

Because the definition of hostile environment is typically obscure, *quid pro quo* has historically been much easier to define. The types of behavior encompassed by hostile environment harassment are still evolving. This type of discrimination is the root problem in the *Dukes v. Wal-Mart* case. According to Gutman, "the history of gender discrimination is, inherently, the history of discrimination against women," (103). Wal-Mart has continually denied women job assignments and promotions they deserve, specifically because of their gender. By putting women at a disadvantage and persistently promoting men into management positions, Wal-Mart is thought to be liable

for hostile environment harassment, specifically gender discrimination, as covered under Title VII of the CRA '64.

Equal Pay Act of 1963

This act is one of the most simple in EEO law. The Equal Pay Act (EPA) protects only one class (gender) and covers only one practice (wage bias) with a single judicial scenario. Unlike Title VII, employers with only two or more employees (one from each gender) are subject to abide by this law. Although the act protects both genders, most claimants are women. Arthur Gutman relates this to *Dukes v. Wal-Mart* by commenting "this combination is perhaps the most relevant historical indicator of segregation and classification of women in the workplace" (166). The main provision of the act is below, taken directly from the EEOC website (U.S. EEOC).

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees *on the basis of sex by paying wages* to employees in such establishment at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires *equal skills, effort, and responsibility*, and which are performed under similar *working conditions*, except where such payment is made pursuant to (i) *a seniority system*, (ii) *[a] merit system*, (iii) *a system which measures earnings by quantity or quality of production*, or (iv) *a differential based on any other factor than sex*, provided that an employer who is paying a wage rate differential in violation of the subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Congress presented numerous conditions that occurred in industries engaged in commerce or in the production of goods for commerce due to wage differentials based on sex. These conditions were set forth to be corrected by the EPA and its power to regulate commerce. The following are direct outcomes of unequal pay: (1) depresses

wages and living standards for employees necessary for their health and efficiency; (2) prevents the maximum utilization of the available labor resources; (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burdens commerce and the free flow of goods in commerce; and (5) constitutes an unfair method of competition (U.S. EEOC).

The definition of equal work is centered on four factors: skill, effort, responsibility, and working conditions. Two jobs are considered “equal” if each requires the same or similar requirements in the four factors. The following diagram defines the factors for clarification.

Figure 1

	Factor	Definition
1	SKILL	Experience, training, education, and ability
2	EFFORT	Physical and mental exertion
3	RESPONSIBILITY	Accountability and supervisory duties
4	WORKING CONDITIONS	Physical surroundings and hazards

The provisions of the EPA exclude and do not apply certain types of employees, such as those in a bona fide executive, administrative, or professional capacity; any employed by an establishment which is an amusement or recreational organization, camp, or religious or non-profit educational center; any employee employed in harvesting and farming of fish and other aquatic life or in agriculture, and a few others.

Wal-Mart has consistently paid men more than women in the same job, who exert similar skill, effort, responsibility, and perform under the same working conditions.

Testimonials from women employees of Wal-Mart will be described in more detail in the next section. This repeated behavior appears to be in violation with the EPA.

Civil Rights Act of 1991

The passage of the Civil Rights Act of 1991 (CRA '91) occurred on November 12, 1991. The purpose of the act was to “amend the CRA '64, to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes” (U.S. EEOC). After several Supreme Court decisions that made it more difficult to bring successful employment discrimination claims, the CRA '91 was designed.

Specifically, Congress discovered that (i) additional remedies under federal law were needed to deter unlawful harassment and intentional discrimination in the workplace; (ii) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio* had weakened the scope and effectiveness; and (iii) legislation is necessary to provide additional protection against unlawful discrimination in employment (U.S. EEOC). Therefore, the CRA '91 sought to (i) provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; (ii) to codify the concepts of “business necessity” and “job related” enunciated by the Supreme Court in *Griggs v. Duke Power Co.* and its other Supreme Court decisions; (iii) confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the CRA '64; and (iv) respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

For the first time, the law allowed sufferers of employment discrimination to sue for punitive and compensatory damages, along with the usual Title VII damages.

According to the act,

A complaining party may recover punitive damages under this section against a respondent if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual (U.S. EEOC).

and

The sum of the amount of compensatory damages awarded this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party...(U.S. EEOC).

The latter statement continues on to outline monetary provisions dependent upon number of employees and length of weeks worked during a calendar year (U.S. EEOC).

Another aspect of the CRA of '91 was the formation of the "Glass Ceiling Commission." Title II imposed that this commission focus attention on, and complete study relating to, the existence of artificial barriers to the advancement of women and minorities in the workplace, and make recommendations for overcoming such barriers. The Secretary of Labor is the Chairperson of the twenty-one member Commission. It is important to note that this title did not directly impose any responsibilities or obligations on the EEOC except to provide information and technical assistance as requested by the new Commission.

Wal-Mart's practice of better wages and promotions for its male employees is directly in conflict with the concept of the glass ceiling. The company seeks to bar

women from high paying, middle management and beyond positions. Again, their company-wide practices are thought to be in violation of the CRA '91.

Section III: Study and Analysis of *Dukes v. Wal-Mart*

Six years ago, in mid-2000, Betty Dukes filed a discrimination claim against Wal-Mart, stating the company's personnel practices were in violation of Title VII of the CRA '64. Regarding her treatment at Wal-Mart, Dukes said, "I knew it was unfair. A lot of women are being sex-discriminated against every day and don't know it," (Featherstone 3). The next year, her claim grew into a lawsuit, eventually leading to the birth of the largest class action lawsuit in history. In June of 2001, the lawsuit was filed in the U.S. District Court in San Francisco, California, which was followed by a motion for class certification in April 2003. *Dukes v. Wal-Mart* represents 1.6 million women, all past and present female employees of Wal-Mart employed since December 26, 1998 (*Dukes*).

To accurately understand the job hierarchy at Wal-Mart stores, a depiction has been provided (Appendix I). Beginning with hourly entry level hires, proceeding to store management, and finally concluding with above store management, the representation of Wal-Mart's organizational chart is exact. It is important to note that the position of cashier, one of the lowest rungs on Wal-Mart's ladder (meaning lowest paid), is mainly held by women. In fact, more than ninety-two percent of all Wal-Mart cashiers are women (Featherstone 96).

Wal-Mart's Compensation Policies

Hourly Structure

A basic pay structure is utilized to compensate all hourly employees at every Wal-Mart store. The Wal-Mart home office establishes a minimum starting wage for

each class of hourly jobs for each store. Store Managers are granted considerable discretion in making salary decisions for hourly employees in their individual stores. Specifically, they are allowed to deviate from the minimum start rates, within a two dollar per hour range. These deviations need not be constrained by objective criteria and are fulfilled with limited oversight. In addition, Store Managers are allowed to increase pay for exceptional performance, again with limited guidance or oversight. However, if an employee's pay rate is set at more than six percent above the minimum rate set by the home office, District Managers and Specialty Group Regional Managers receive "exception reports" and must approve the rates. As one Store Manager explained, "There's [a presumptive limit of two dollars above the base], but I can do what I want. I mean, if I start throwing money around, I mean, eventually the phone is going to ring. But the Store Manager has the flexibility to do what he needs to do to run the building" (*Dukes*). This "flexibility" is what the class members of *Dukes* are trying to prove was part of Wal-Mart's discriminatory pay practices.

Salary Structure

There is a fundamental compensation structure that applies similarly to all in-store salaried management positions across all types of Wal-Mart stores, which begins with a base salary within a corporation-decided range, with adjustments allowed for profit incentives and/or merit increases. Most importantly to the plaintiffs' claim, all in-store salaried positions – like all hourly positions – share the general feature that a broad range of discretion is built into the pay structure for each position, which provides a potential agent for such discrimination. This evidence indicates that there is significant consistency across stores, and that Wal-Mart's policies all contain a common

feature of subjectivity that is relevant to the plaintiffs' claims of class-wide gender discrimination.

The figure below describes the pay structure for salaried employees at the management level in Wal-Mart stores. For each position, its compensation and its determination are explained.

Figure 2

Pay Structure for Salaried Employees	
Assistant Managers	<p>District Managers have discretion to set pay rates with little guidance and limited oversight.</p> <p>Assistant Managers receive a base salary of between \$29, 500 and \$47,000, with eligibility for annual performance and merit increases and a bonus.</p>
Co-Managers	<p>District Managers have discretion to set pay rates with little guidance and limited oversight.</p> <p>Co-Managers receive a base salary within the range of \$42,000 to \$47,000, with eligibility to participate in an incentive plan based on store profitability. These employees are not eligible for performance or merit increases.</p>
Specialty Department Managers	<p>Specialty Department Managers are paid under a "different compensation plan." Pay rates are set by higher level managers with complete discretion with little guidance and limited oversight.</p> <p>These managers are paid base salaries in broad ranges, from \$24,000 to over \$40,000, with eligibility for incentive plans, performance increases, and merit increases.</p>
Store Managers	<p>Base salaries are determined by upper level managers with broad discretion within an established range.</p> <p>Store Managers are paid a base salary determined by store size, ranging from \$44,000 to \$50,000. These employees are eligible to receive incentives based on store size and profitability.</p>

Wal-Mart's Promotion Policies

Comparable to salary decisions, both the plaintiffs and the defendant agreed that subjectivity is a prime feature of promotion decisions for in-store employees. Former Wal-Mart CEO and President Thomas Coughlin stated, "We push down to the manager of the facility level, the responsibility to run those stores right" (*Dukes*). Typically, the subjectivity in promotion decisions occurs in two primary ways: (1) a largely subjective selection practice with very minimum objective criteria, supplemented with (2) a failure to post a large proportion of promotional opportunities (*Dukes*).

Even Wal-Mart states there is no argument in the fact that Wal-Mart allows Store Managers to apply their own subjective criteria when selecting candidates for the Support Manager position. However, it is the duty of District and Regional Managers to decide which employees can advance into the Management Training Program. Wal-Mart follows minimum corporate guidelines for promotions into these positions, and utilizes a "tap on the shoulder" process for choosing employees who meet the Store Manager's subjective criteria. The decision to promote someone is solely up to the Store Manager. To even be eligible for a promotion, employees must meet certain requirements. Having an "above average" evaluation, at least one year in their current position, up-to-date on training, not be in a "high shrink" department or store, be on the company's "Rising Star" list, and be willing to relocate are the minimum requirements (*Dukes*).

Additionally, the highest in-store positions – Assistant Manager, Co-Manager, and Store Manager – are subjected to the same personal assessments beyond adherence to the aforementioned corporate guidelines. Furthermore, "Wal-Mart's

promotion practices are compounded by the fact that the company does not monitor the promotion decisions being made or otherwise systematically review the grounds on which candidates are selected for promotion” (*Dukes*).

Hourly workers claim that Wal-Mart does not have posters, brochures, or any sort of information to inform them of how to get promoted into the Management Training Program. The company has admitted that it did not regularly post job vacancies for its higher level management positions until January 2003. Regardless of a stated policy to post hourly Support Manager positions (the immediate position before the Management Training Program), Wal-Mart failed to post about eighty percent of these openings (*Dukes*). Without being posted and displayed, the class members did not have the opportunity to apply for, or even express interest in, openings as they came about. The result was that Store Managers “did not have to consider all interested and qualified candidates, thus further intensifying the subjective nature of the promotion process” (*Dukes*).

Alternatively, Wal-Mart did post openings for Store Manager positions during this time period. Nonetheless, employees were still barred from applying if they did not obtain permission from their District Manager. And such Managers relied upon their own subjective criteria (beyond the minimum corporate guidelines) to consider who would be allowed to apply. So, in spite of having posted these specific openings, Wal-Mart still relied on the subjective thoughts and opinions of managers for the promotion process for management positions. Consequently, by alienating these employees from the opportunity for advancement, Wal-Mart’s discretionary criterion used for promotions was deemed as unlawful by the plaintiffs in this case.

Wal-Mart's Corporate Culture

The class members presented evidence that Wal-Mart has implemented and follows a "strong, centralized corporate culture," originally installed by founder Sam Walton (*Dukes*). In particular, plaintiffs stated that Wal-Mart's corporate culture, or the "Wal-Mart Way," includes two key, universal aspects relevant to the case: 1) a strong emphasis on building and maintaining a corporate culture and 2) an environment that may include gender stereotyping.

It has been assumed that Wal-Mart operates with a "strong and distinctive, centrally controlled, corporate culture" (*Dukes*). Otherwise known as the Wal-Mart Way, this culture endorses and maintains a strict uniformity of operational and personnel practices. To further prove that Wal-Mart's culture is perpetrator in the company's discriminatory pay and promotion policies, the plaintiff's expert, Dr. William Bielby, stated, "[a] strong and widely shared organizational culture promotes uniformity of practices throughout an organization" (*Dukes*). Dr. Bielby is a sociology professor at the University of California at Santa Barbara and has previously testified in other major sex discrimination class action lawsuits (Featherstone 69).

Strong evidence exists that Wal-Mart's culture is not unique, but in fact, very uniform throughout all stores. Every new employee attends the same orientation process and is trained about the company's culture. From then on, employees at Wal-Mart attend daily meetings during shift changes, where managers discuss the company culture and do the Wal-Mart cheer. Mandatory store meetings are opportunities for employees to receive weekly culture-related training. Store Managers use comprehensive schedules of corporate training lessons and training materials to present

to employees at these weekly meetings. Moreover, all stores use the same Computer-Based Learning Modules for required training on culture topics. As much as it is important for any position at Wal-Mart, culture is an extremely integral part of all management training programs. Overall, understanding and becoming the Wal-Mart culture is a never-ending process for all employees. One manager believes, the company has a "continual process of learning culture" (*Dukes*).

Wal-Mart utilizes a prominent policy of promoting from within the company. When followed, this method ensures that the more junior-level employees use their knowledge of the company culture to promote common understanding and practice among the store's management team. In addition, the company regularly transfers store level managers from one Wal-Mart to another, from state to state, and between Wal-Mart and Sam's Club stores. Such mobility would only prove effective and efficient in a company with a high degree of store-to-store uniformity (*Dukes*). All of the above practices help ensure the Wal-Mart Way culture is uniform throughout all stores.

Dr. Bielby exercised his opinion on Wal-Mart's strong corporate culture. After much research, including depositions, Wal-Mart policies, and professional research and literature in the field, his opinion is as follows:

In sum, consistent with the organizational research on this topic, Wal-Mart's distinctive corporate culture is sustained by focused efforts of the firm through on-going training and socialization, communication specifically designed to reinforce its distinctive elements, promotion from within and relocating managers from store to store, and shared experiences among employees that build commitment to shared beliefs and values. As a result of these efforts, employees achieve a common understanding of the company's ways of conducting business (case).

In Liza Featherstone's recent book, Selling Women Short, she pointed out that several Wal-Mart employees she interviewed tended to agree with Dr. Bielby; in fact, most concluded that the "company was very homogeneous throughout its operations and was highly centralized" (69). In the words of Lorraine Hill, a former Wal-Mart employee who was worked in two different stores, "It has been my experience that they are pretty much the same. Same rules, same theory, same intimidation. Same everything, and same low wages," (Featherstone 70).

Wal-Mart's rebuttal against this statement was that each of its stores is a virtual "main street" of stores within a store, all run by independent managers, each division having its own unique hierarchical structure of reporting and supervision. The truth is that although there are some terminology and detail variations from division to division and within departments, there is not a significant difference in functions performed. As alluded to earlier, the plaintiffs believe that all basic operational structure and staffing patterns of stores are quite uniform, given the fact that each store is operating under oversight from the home office, where all regional and higher level managers are based.

After listening to and evaluating the evidence presented by the plaintiffs and the defendant, United States District Judge Martin Jenkins came to the subsequent conclusion. Evidence indicated that pay and promotion decisions are largely subjective and determined by the discretion of store or district level managers, which is a common feature that allows the discriminatory practice of gender bias to become prevalent within the system. That said, these subjective decisions were not made in seclusion. The centralized corporate policies provided some degree of constraint on management's discretion over personnel decisions. Furthermore, evidence was suggestive of the

company's reliance on its deeply ingrained culture to guide managers in the exercise of their discretion. Due to the uniformity of such practices, it is obvious that these actions can be applied to the class as a whole, thereby meeting the commonality requirement for a class action certification (*Dukes*).

The second aspect of the Wal-Mart way imperative to this case is the fact that the company's culture created a breeding ground for gender bias. Once again, the plaintiffs relied on Dr. Bielby to show that employers create gender barriers when they allow gender stereotypes to affect personnel decisions. His research indicated that such stereotypes are likely to influence personnel decisions when they are based on subjective factors, as in this case. Dr. Bielby corroborated that Wal-Mart managers make decisions with considerable discretion and little oversight. These subjective promotion and pay decisions are expected to be biased "unless they are assessed in a systematic and valid manner, with clear criteria and careful attention to the integrity of the decision-making process" (*Dukes*). He went on to mention that these systematic elements are missing from Wal-Mart's decision-making process.

Next, Dr. Bielby studied and commented on Wal-Mart's diversity and equal opportunity policies, which are just a few years old. He noted that express weaknesses make identifying and eliminating discriminatory barriers difficult. For instance, although Wal-Mart does gather statistics on its workforce's gender composition on a regular basis, there is no systematic evaluation to locate potential barriers to women's advancement. Another example is that Wal-Mart sets very impromptu or unplanned diversity goals for female representation in management. Specifically, managers simply implement their subjective determinations or set goals as incremental improvements

over the prior year. This is done instead of striving for goals based on the knowledge of the number of qualified and interested women available for a certain position.

In general, while Dr. Bielby noted that Wal-Mart has focused its emphasis on diversity in recent years, the company has failed to “translate it into practical and effective measures” (*Dukes*). Hence, little impact on gender differentials in pay and promotion has occurred.

Wal-Mart countered this argument by attempting to prove that the company culture does promote diversity. The defendant stated that Wal-Mart has earned national diversity awards, company handbooks and training include diversity statements, and diversity goals, performance assessments, and penalties for EEO violations are in place.

Judge Martin Jenkins concluded that Dr. Bielby presented enough of a basis to provide a foundation for his opinions. He believes the sociologist’s testimony describes corporate uniformity and gender stereotyping common to all class members (*Dukes*).

Evidence of Discrimination

The well-accepted use of statistical analysis is enough to imply class-wide discrimination and to satisfy commonality. For this the plaintiffs depended on the expert testimony of Dr. Richard Drogin, an emeritus professor of statistics at California State University at Hayward and a private statistical consultant (Featherstone 104). Dr. Drogin asserted that statistically significant disparities between men and women exist at Wal-Mart in terms of compensation and promotions. He believed that these disparities are wide-spread and across regions, which are indicative of the only explanation of gender discrimination. This analysis is accompanied by the expert testimony of Dr.

Marc Bendick, a labor economist. By performing a benchmarking study of twenty of Wal-Mart's competitors, he was able to conclude that Wal-Mart promotes a lower percentage of women than its current competitors (*Dukes*).

Regarding Compensation

The experts for each side performed tests analyzing Wal-Mart payroll and personnel data to determine whether gender disparities in salary did exist and, if they did, whether they could be accredited to discrimination. Plaintiffs present statistics which show that:

Women working in Wal-Mart stores are paid less than men in every region, pay disparities exist in most job categories, that the salary gap widens over time even for men and women hired into the same jobs at the same time, that women take longer to enter into management positions, and that the higher one looks in the organization the lower the percentage of women (*Dukes*).

Dr. Drogin performed individual regression analyses for both hourly and salaried employees for each Wal-Mart region. The regressions proved statistically significant disparities for all in-store job classifications in all forty-one Wal-Mart regions.

The discovered result was that women were paid total earnings between five and fifteen percent less than total earnings paid to similarly situated men in each year of the class period (*Dukes*).

Dr. Drogin's regression variables included seniority, turnover, performance, and other factors, none of which were responsible for the disparities in pay. Thus, the results of the regression analysis confirm that gender is a statistically significant variable in accounting for the salary differentials between female class members and male employees at Wal-Mart stores (*Dukes*).

As defense to the plaintiffs' expert testimony, Wal-Mart claimed that "women prefer the hourly jobs because they have children and these jobs are more flexible" (Featherstone 105). Hourly supervisor positions, such as the position of Department Manager, worked well for women, Wal-Mart insisted, because they are weekday, daytime shifts, unlike most salaried manager positions which require the employee to work nights and weekends.

Regarding Promotions

Dr. Drogin performed a statistical analysis of Wal-Mart's internal promotion data for the class period. His conclusion stated there is a statistically significant shortfall of women being promoted into each of the in-store management classifications over the entire class period, on a company-wide basis. Also noted was the pattern of under-promotion was "consistent in nearly every geographic region at Wal-Mart" (*Dukes*).

Specific results included the fact that it consistently takes women longer than comparable men to reach higher management levels. While it only takes men 2.86 years on average to be promoted to the Assistant Manager position, women only received promotions to the same position after 4.38 years. Similarly, men reached the Store Manager position in as little as 8.64 years, while women waited 10.12 years for this promotion (*Dukes*). Dr. Bendick, the labor economist, determined that this shortfall cannot be rationalized in terms of lack of qualifications, interest, or availability among female employees. At this time, the Court did not find whether the analysis and conclusion were correct, but it did acknowledge that Dr. Drogin and Dr. Bendick's analyses further support the plaintiffs' showing of commonality for discrimination.

Anecdotal Evidence of Discrimination

Circumstantial and anecdotal evidence of discrimination is universally used in Title VII pattern and practices cases to strengthen the statistical proof by bringing “the cold numbers convincingly to life” (*Dukes*). Such evidence includes sworn affidavits from each of the class representatives and 114 declarations from class member witnesses around the country. Below is a list of discriminatory accounts from these women. Each of these descriptions attempt to explain Wal-Mart’s discriminatory pay and promotions policies.

“Men are here to make a career and women aren’t. Retail is for housewives who just need to earn extra money” (*Dukes*)
– A male Support Manager

“At my store, male associates brag about their pay.” After listening to the bragging, it was soon easy to see that they were telling the truth about their wages, and she was being paid less than men who were doing the very same job, even though she’d been with the company longer. Her department manager attempted to explain to her why women will always be paid less than men, “God made Adam first, so women will always be second to men,” (*Featherstone* 128).
-- Kathleen MacDonald, *Dukes* witness

During a performance evaluation, a male Senior Vice President told a female Senior Buyer, “...you aren’t part of the boy’s club, and you should raise a family and stay in the kitchen.” He also told her that “because you didn’t hunt or fish, you probably won’t advance any further” (*Featherstone* 77).
-- Julie Donovan, *Dukes* witness

Regarding her position as Co-Manager of a Wal-Mart store, Gretchen Adams shared that, “I had the title, but not the pay.” Two fellow (male) co-workers with less experience were making \$47,000 annually, while Adams only made \$43,500. After a complaint, Adams’ pay was raised to \$47,000 a year, but was denied an explanation or any back pay (*Featherstone* 132).

A Store Manager gave sporting goods department manager position to a male because she “needed a man in the job” (*Dukes*).

"We need you in toys...you're a girl, why do you want to be in Hardware?"
(*Dukes*)

– A male Support Manager

After being promised and denied a promotion, which was given to a man, Odle revealed, "Everybody had already told me I had the job. Then they just decide, 'Hmm, this guy's more important than you are.'" (Featherstone 18).

-- Stephanie Odle, *Dukes* witness

Conclusion

To summarize, plaintiffs and class members of *Dukes* were seeking an order to reform Wal-Mart's practices (injunctive relief), to recover lost wages and benefits for the women discriminated against (special damages), and monetary relief to deter Wal-Mart and other retail companies from pursuing a similar discriminatory course of action (punitive damages).

Following the consideration and review of all evidence presented in *Dukes v. Wal-Mart*, on June 21, 2004, the court found that the plaintiffs' motion for class consideration would be granted in part and denied in part. Because the court was satisfied that the plaintiffs' successfully met each of the requirements mandatory for class consideration, the court similarly agreed the plaintiffs' request for equal pay was manageable. However, the court determined the plaintiff's claim was manageable with respect to liability, injunctive, and declaratory relief, but unmanageable with respect to special damages, or lost pay. For those members of the class where objective data is available to document the employee's interest in the respective promotion, the remedy of lost pay was decided as manageable. In other words, while the members are acting as a class, special damages will be paid on an individual basis.

Section IV: Outcomes and Implications

Current Status of Dukes v. Wal-Mart

Currently, Betty Dukes is employed full-time as a greeter at Wal-Mart. Her move from cashier to greeter was not a promotion, although her pay did increase from \$8.47 to more than \$10.00 per hour. Because Dukes' wages are still so low, she has taken on a second job as a part-time house cleaner and companion to an elderly woman in exchange for rent (Featherstone 4).

Stephanie Odle is another *Dukes* witness who has not lost faith in the Wal-Mart. She still has her Sam Walton pin and admits that she would be happy to return to work for the company. Odle accepts that "Wal-Mart can be the company that they were when I started working for them. I believe in that company," (Featherstone 89).

The plaintiffs are currently awaiting the Ninth Circuit's decision on Wal-Mart's appeal of the class certification order. The trial court has stayed (frozen) *Dukes* until the Court of Appeals rules in the class certification order. Assuming Wal-Mart's appeal of the class is not granted, there is a chance that either party will agree to settle. If the case does make it to trial, it's a safe bet that it won't be resolved in less than five years. Despite the fact that *Dukes* may not appear in a trial court, the case is of immense public interest due to Wal-Mart's success in the U.S. economy and the number of women affected (Featherstone 8).

Predicted Outcome

Despite the continued several-year length of the case, it is the author's opinion that *Dukes* will maintain its class action certification and proceed to trial. I find it difficult to believe that any judge presiding over this case would recognize and grant Wal-Mart's

appeal of the certification. The plaintiffs' innumerable amount of evidence and personal accounts of Wal-Mart's pay and promotion disparities cause me to believe that Wal-Mart may accept defeat of this lawsuit. The statistical evidence of discrimination is so consistent and strong among every region in the U.S.; I fully trust that Betty Dukes, the other five plaintiffs, and the rest of the class members will prove to a jury that each and every one of them was personally discriminated against because of their gender. As mentioned above, the possibility of *Dukes* becoming a trial case would have vast repercussions for both the retail industry and the female population.

Implications for Employers

It is important to note that every business is vulnerable to discrimination cases such as *Dukes*. And the consequences are anything but pleasant or profitable for an employer afflicted with a discrimination lawsuit. However, larger corporations that are not attentive about preventing these types of lawsuits are going to be even more vulnerable because they have deeper pockets. For example, Boeing, Morgan Stanley, Costco, Home Depot, and PricewaterhouseCoopers have also been involved in high profile discrimination suits. Several of these suits have settled before trial, often for tens of millions of dollars. Specifically, Boeing paid more than \$70 million to avoid a trial and Morgan Stanley reached a settlement for \$54 million. In addition to these companies and Wal-Mart, it is expected that more gender and pay-based class action lawsuits will arise in the future. A natural result, these types of lawsuits encourage others, who may be feeling alienated from their company, to take action. Nationwide, employees will begin to realize that perhaps their own situation is unfair and should be remedied.

Companies across the country need to sit up and pay attention to the problems their competitors are facing. To safeguard itself from the possibility of bad press and high costs, corporate America is now on high alert. Some tools that large employers can use to deflect potential lawsuits are anonymous employee satisfaction surveys, constant training and consistent management practices, and open lines of communication. Also, teamwork and listening to employees goes a long way to avoiding lawsuits.

Implications for Women

By studying the nation's ever-changing demographics, an important shift is becoming prevalent. New workers in the workforce are women, and those leaving it are men. What does this mean for these females? Especially for pervasive hostile environment discrimination such as *Dukes*, the greater number of women in the workplace, the less likely they will be involved in a gender-biased environment. The more women there are in a company, the more ability to influence the environment they have. This was particularly the problem with *Dukes*. Despite having more than two-thirds of female employees (mainly cashiers), only around one-third of management positions were held by women. Wal-Mart's long-seeded corporate culture of promoting men into management severely limited a woman's opportunities for influence in the workplace.

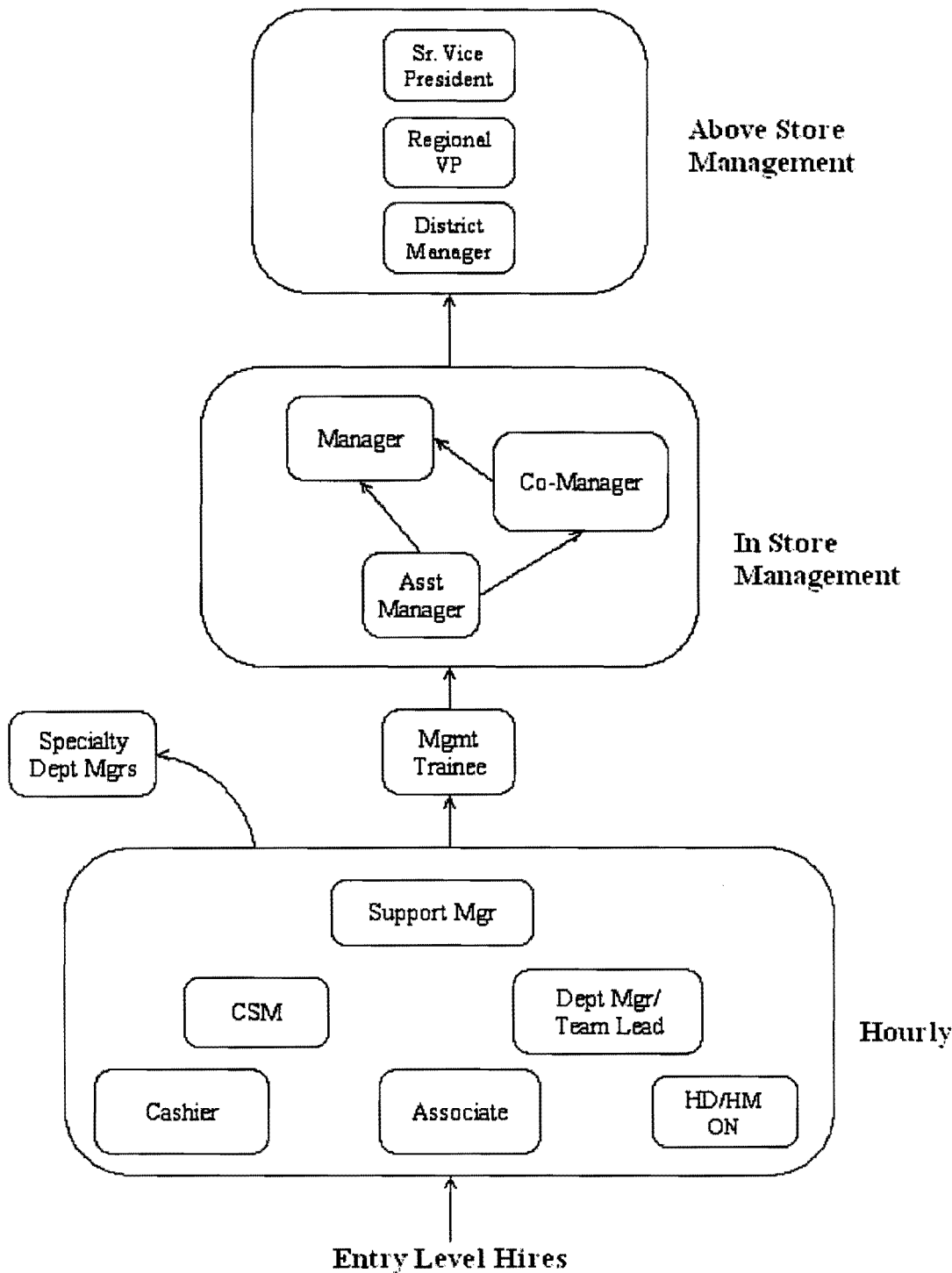
And because of other high-profile discrimination cases in the past few years, women today are more likely to stand up for themselves in the face of inequality. By asserting their rights and accepting feelings of empowerment, many women will choose to no longer stand by and avoid action. With each year that passes, women in the

United States gain more and more ground in the fight for equality among the sexes.

Hopefully, one day the battle will be over and men and women alike will share the same rights in the workplace.

APPENDIX I

Wal-Mart's Organizational Chart



Source: www.walmartclass.com/staticdata/charts/table2a.html

Works Cited

Dicker, John. The United States of Wal-Mart. New York, New York: Penguin Books, 2005.

Dukes v. Wal-Mart, 222 F.R.D. 137 (2004).

Featherstone, Liza. Selling Women Short: The Landmark Battle for Workers' Rights at Wal-Mart. New York, New York: Basic Books, 2004.

Gutman, Arthur. EEO Law and Personnel Practices (2nd. Ed.). Thousand Oaks, California: Sage Publications, 2000.

Jackson, Susan E. and Randall S. Schuler. Managing Human Resources Through Strategic Partnerships (8th Ed.). Mason, Ohio: South-Western, 2003.

Ortega, Bob. In Sam We Trust: The Untold Story of Sam Walton and How Wal-Mart is Devouring America. New York, New York: Times Books, 1998.

Trimble, Vance H. Sam Walton: The Inside Story of America's Richest Man. Dutton Books. New York, New York: Penguin Books, 1990.

U.S. Equal Employment Opportunity Commission. 24 Apr 2004. U.S. Equal Employment Opportunity Commission. 15 Mar 2006. <<http://www.eeoc.gov/>>.

Wal-Mart Class Website. 8 Aug 2005. 15 Mar 2006. <www.walmartclass.com>.

Walton, Sam. Sam Walton: Made in America. New York, New York: Doubleday Books, 1992.